RE GANAPATHY SIVAGNANAM; EX P PHILEOALLIED BANK (MALAYSIA) BHD

HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[BANKRUPTCY NO: 29-462-1998]
2 AUGUST 2013

BANKRUPTCY: *Notice - Setting aside - Application for - Affidavit under r. 95 Bankruptcy Rules 1969 - Whether satisfied requirement under r. 94(2) - Whether bankruptcy notice bad in law*

BANKRUPTCY: *Notice - Validity of - Bankruptcy notice based on default judgment - Non-statement of third party security in favour of judgment creditor - Whether rendered bankruptcy notice bad in law*

The judgment creditor ('JC') had obtained judgment against the judgment debtor ('JD'). However, the JD failed to satisfy the judgment after making three payments to the JC. Hence, the JC proceeded to file a bankruptcy notice ('BN') based on the balance judgment sum which was not paid. The JD tried to set aside the BN by filing a r. 95 of the Bankruptcy Rules 1969 ('the Rules') affidavit claiming that there was a third party charge over a property created in favour of the JC which if and when sold was more than enough to satisfy the judgment debt or the balance thereof. The learned Senior Assistant Registrar ('SAR') dismissed the application and hence, this appeal. The JD challenged the BN on the basis that (i) the JD had a set-off or cross demand or counterclaim against the JC by virtue of the third party charge in favour of the JC over a piece of property where the market value was more than the balance judgment debt owed by the JD to the JC; (ii) the BN was not in accordance with the terms of the judgment; and (iii) the BN was bad in law as it did not state the third party security in favour of the JC with respect to the loan taken for which default judgment had been entered by the JC.

Held (dismissing appeal with costs):

(1) The security, on which the loan application was based, had not been referred to in the BN thereby rendering the BN defective. The Registrar must consider whether in the light of the evidence adduced by the JD, there was a genuine triable

A case on counterclaim, set-off or cross demand which (i) was enforceable by action and not merely by a claim; (ii) equals to or exceeded the judgment debt; and (iii) could not have been set up in the action in which the judgment was obtained. Hence, it was necessary to first determine if the third party B charge over the property as security for property gave rise to a set-off that the JD could raise against the JC. (paras 12 & 14)

(2) The JC had, in the suit where the judgment had been C entered, sued for the outstanding amount of the loan taken by the JD as a borrower. It had not been shown how the JD could have a set-off arising, presumably, from the proceeds that would be had from the auction of the third party charged property. The fact that there was a charged property was no D defence to the JC's action in contract in the suit which was an action *in personam* under which the judgment had been entered. The action on the third party charged property was an action *in rem*. (para 16)

(3) The affidavit filed under r. 95 of the Rules did not satisfy the E requirement of r. 94(2) of the Rules. Thus, there was no affidavit at all for the purpose of setting aside the BN. Hence, the appeal was totally devoid of merits and ought to be dismissed (*Datuk Lim Kheng Kim v. Malayan Banking Bhd*, foll; *In Re A Debtor*, dist). (paras 19 & 22) F

(4) An affidavit under r. 95 of the Rules is very focused in that the JD has to say that he has satisfied the judgment debt in full or that he has a counterclaim, set-off or cross demand that equalled to or exceeded the JC's claim. The JD, in his G affidavit, had not descended to any definitiveness or details on what was said to be defective or deficient of the BN although he stated that the BN issued was not based on the judgment entered. The bankruptcy court could not go behind the final judgment against which there had not been any appeal (*Datuk* H *Mohd Sari Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd*, dist). (paras 23 & 27)

(5) Nowhere is it required to be stated in the BN the security furnished by a third party. Even in the creditor's petition, such I a requirement was not necessary unless the security was that

furnished by the JD himself. The argument that the BN was bad in law because of the non-statement on the security of the loan in the BN was without merits and was therefore dismissed. (para 31)

(6) The JC raised issues of law which need not be raised in an affidavit in reply. The JC was not disputing the three payments made and as to the conclusion of the law, it was for counsel to argue in submissions which they did before the SAR and in the instant appeal. Hence, there was no dispute of facts that the JC was deemed to have admitted other than the allegations of a set-off which was a point of law for submission and which had been submitted on. (paras 35 & 36)

Case(s) referred to:

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 SC ***(foll)***

Datuk Mohd Sari Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd [1992] 4 BLJ 265 SC ***(dist)***

Harcharan Singh Sohan Singh v. Ranjit Kaur S Gean Singh [2010] 3 CLJ 29 CA ***(refd)***

In Re A Debtor (1963) 1 WLR 51 CA ***(dist)***

Lim Koon Chow v. AmBank (M) Bhd [2012] 4 CLJ 624 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(not foll)***

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***

Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 FC ***(refd)***

Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i),
Bankruptcy Rules 1969, rr. 18(1), 94(1)(b), (2), 95

For the judgment debtor - P Justine Devakumar; M/s R J Esa
For the judgment creditor - Nur Azean Lee Abdullah; M/s Khong & Son

Reported by S Barathi

A

JUDGMENT

Lee Swee Seng JC:

[1] The judgment creditor ('JC') had obtained judgment against the judgment debtor ('JD') and the JD had failed to satisfy the judgment after making three payments to the JC. The JC proceeded to file a bankruptcy notice ('BN') based on the balance judgment sum not paid. The JD tried to set aside the BN by filing a r. 95 Bankruptcy Rules 1969 ('BR') affidavit in encl. 58. Essentially the JD is saying that there is a third party charge over a property created in favour of the JC which if and when sold is more than enough to satisfy the judgment debt or the balance thereof.

[2] The learned Senior Assistant Registrar (SAR) dismissed the r. 95 application. The JD being dissatisfied with the decision has appealed to this court.

Prayer

[3] The JD is appealing against the refusal of the SAR to set aside the BN. The JD's reasons for filing the r. 95 affidavit are as follows:

(i) That he has a cross demand, counterclaim or a set-off against the JC by virtue of a third party charge over a piece of property in favour of the JC which has not been auctioned yet which market value is more than the balance judgment debt owing by the JD to the JC;

(ii) That the BN is not in accordance with the terms of the judgment in that even though some payments have been made towards reduction of the judgment debt, the BN should still be premised upon the full judgment sum obtained; and

(iii) That the BN issued is bad in law as it does not state the third party security in favour of the JC with respect to the loan taken for which default judgment had been entered by the JC against the JD.

[4] It was also argued that as the JC had not filed any affidavit to oppose the JD's application *via* the affidavit filed under r. 95 BR, the JC is deemed to have admitted the averments raised against the JC and that the setting aside of the BN should have been allowed.

Principles

[5] Rule 94 provides for particulars to be endorsed in a BN as follows:

> **94. Particulars to be endorsed on notice**
>
> (1) Every bankruptcy notice shall be endorsed with:
>
> (a) the name and place of business of the solicitor who is suing out the notice, or if no solicitor is employed, with a memorandum that it is sued out by the creditor in person;
>
> (i) the name and National Registration Identity Card number of the debtor.
>
> (b) an intimation to the **debtor that if he has any counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt**, and **which he could not have set up in the action in which the judgment or order was obtained**, he must within the time specified in the notice **file an affidavit to that effect** with the Registrar.
>
> (2) In the case of a notice served in the Federation the time shall be **seven days**. In the case of a notice served elsewhere the Registrar when issuing the notice shall fix the time. (emphasis added)

[6] Rule 95 BR states as follows with respect to the affidavit to be filed for the above purpose:

> **Application to set aside.**
>
> (1) **The filing of an affidavit shall operate as an application to set aside the bankruptcy notice**, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.
>
> (2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and **no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined**. (emphasis added)

Whether The JD Has A Set-Off Against The JC Within The Meaning Of r. 94(1)(b) BR In The r. 95 BR Affidavit Filed

[7] Pursuant to r. 94(1)(b) BR, the bankruptcy notice in encl. 2 is indorsed with an intimation to the JD that if he has any counter claim, set-off or cross demand, which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action, in which the judgment or order was obtained, he must within time specified in the notice file an affidavit to that effect with the Registrar.

[8] According to the BN, the judgment sum (encl. 2) obtained by default is RM106,975.63 as at 24 August 1987 together with interest at the rate of 15% per annum on the aggregate sum from 16 June 1987 to date of satisfaction and default interest at 1 1/3 times the normal ruling rate of interest on all unserviced interest with effect from 16 June 1987 to date of satisfaction and $225 as costs.

[9] The BN is being challenged on the basis that the JD has a set-off or cross demand or counterclaim. According to the valuation report, the forced sale value of the property is RM485,000.

[10] When the JD applied for the loan of RM90,000 for the overdraft facilities from the JC, it was based on the security of the property held under Geran No. 6564 Lot No. 10244 Mukim Ulu Kinta ('the property').

[11] The claim of the JC can be easily set-off against the sale of the property which is valued at RM485,000 as at 4 October 1982 by M/s Suleiman & Co, charted surveyors and valuers estate agents & property managers. The present value of the property would no doubt be much higher and the claim in the BN can easily be set-off.

[12] This security was not referred to in the bankruptcy notice at all and thus rendering the bankruptcy notice defective and the Registrar must consider whether in the light of this evidence adduced by the JD, there is a genuine triable case counterclaim, set-off or cross demand (a) which is presently enforceable by action and not merely a claim; (b) which equals or exceeds the judgment debt; (c) which could not have been set up in the action in which the judgment was obtained.

[13] Learned counsel for the JD, Mr Justine Devakumar, further referred to the case of *In Re A Debtor* (1963) 1 WLR 51 CA where it was held that the Registrar must set aside the bankruptcy notice if the above stated requirements are established by affidavit evidence. The headnotes at p. 52 reads:

> Held, that the application to set aside the bankruptcy notice ought not to have been dismissed and should be referred back to the registrar for rehearing and to admit the further evidence, for where an issue as to a cross-demand had been joined, the registrar had ample jurisdiction to receive further evidence generally in order to fulfil his duty to reach a conclusion on the question whether there was a genuine cross-demand.

[14] It would thus be necessary to first determine if the third party charge over the property as security for property gives rise to a set-off that the JD can raise against the JC.

[15] The meaning of a "set-off" as compared to and contrasted with a "counterclaim" has been clarified by the Federal Court in *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 at pp. 246-248; [1985] 1 MLJ 157 at pp. 160-161 by His Lordship Salleh Abas LP as follows:

> **A set-off is a cross-claim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued**. A cross-claim is not necessarily a set off, merely because the word used in the pleading is "set-off". Whether or not the plea is a set-off it has to be determined as a matter of law and substance. *Hanak v. Green* [1958] 2 QB 9, 26. **A cross-claim which is accepted as a defence of set off has the effect of extinguishing either the whole or part of the plaintiff's claim**. See *In re A Bankruptcy Notice* [1934] Ch 431, 437. But to constitute a set-off the sum of money meant as a cross-claim must **from its nature and quality be such that it is proper to be dealt with as a defence to the plaintiff's claim** and not as a separate cause or matter...
>
> ... The characteristics of set-off as contained in Order 18 rule 17 are that (1) it is **a cross-claim for a sum of money**, ascertained or otherwise; (2) **it is relied as a defence** to meet the whole or part of the plaintiff's claim, and (3) that it is immaterial whether it is added or not as a counter claim as long as it is included in the defence. Thus, if a cross-claim relied on by the defendant as a set-off does not and cannot absolve the plaintiff's claim because

A it arises from a separate transaction, we agree that the cross-claim is not necessarily a set-off, though it is so described, and that such cross-claim could, because of its nature and quality, only amount to a counterclaim. (See Lord Denning, MR in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1981] 2 MLJ 199, 204.

B

What then is a counterclaim?

A counter claim on the other hand is also a cross-claim which a defendant has against a plaintiff but in respect of which the defendant can bring a separate action against the plaintiff C if he wishes to do so. Thus, to all intents and purposes **a counterclaim is a separate and independent action by the defendant, which the law allows to be joined to the plaintiff's action in order to avoid multiplicity or circuity of suits**. Like set-off, a counterclaim is also the creation of Statutes. At common D law the court has no power to allow an action by a plaintiff to be met by a cross-claim of the defendant against the plaintiff. The court simply left the defendant to commence a separate action. It was only by virtue of the Supreme Court of Judicature Act, 1873, s. 24(3) that enabled the defendant's counter claim to be added to the plaintiff's suit.

E

In so far as our law is concerned, a counterclaim is governed by the provisions of O. 15 r. 2 which we have already set out earlier.

F It is, therefore, clear that *a counterclaim is wider than a defence of set-off and that whilst the former is a separate action by a defendant against a plaintiff, the latter is essentially a defence, although a defendant is entitled to add it as counterclaim*. Being a defence to a plaintiff's action, **the matter sought to be set-off must essentially be connected with or form part of the matter upon** G **which the plaintiff's action is founded**. Indeed Mr Cecil Abraham conceded this point. (emphasis added)

[16] Here the JC had in the suit where judgment had been entered sued for the outstanding amount of the loan taken by the JD as a borrower. It has not been shown how the JD could have H a set-off arising presumably from the proceeds that would be had from the auction of the third party charged property. However that cannot be a defence of set-off let alone a counterclaim. The fact that there is a charged property is no defence to the JC's action in contract in the suit which is an action *in personam* under I which judgment had been entered. The action on the third party

charged property is an action *in rem*. At most what would happen if the auction property yields a sum more than the amount of the judgment debt is that there would be a surplus which would be refunded to the third party chargor and the judgment debt or whatever is the balance of it would have been considered as fully satisfied and extinguished. What is perceived and painted as a set-off is actually what is to be done if the sale proceeds exceed the judgment debt or the balance of it. That is actually poles apart from saying that the JD had a set-off against the JC in the civil suit which he could not have set up in the civil suit.

[17] As pointed out by Miss PM Lee learned counsel for the JC, assuming for a moment that the JD has a set-off against the JC, there is still the requirement that it must be a set-off that he could not have set up in the action in which the said judgment was obtained. That had not been stated in the affidavit of the JD and neither had the JD shown through his learned counsel Justine in his submission. Perhaps what the JD could have done was to have applied for a stay of the judgment obtained in the civil suit on the ground that there is no prejudice to the JC as the third party charged property in favour of the JC is intact and that upon realising the sale by way of public auction pursuant to an order for sale, the judgment debt would be satisfied in full with a surplus to be refunded to the chargor.

[18] An affidavit under r. 95 BR is very strictly limited to its scope as spelt out in the form itself as follows:

No. 7. Affidavit On An Application To Set Aside Bankruptcy Notice.

No. 7

(Rule 95)

(Title)

AFFIDAVIT ON AN APPLICATION TO SET ASIDE BANKRUPTCY NOTICE

I, ... of ... affirm and say:

1. That I was, on the ... day of ..., served with the notice hereunto annexed (or describe the notice).

That I have satisfied the judgment debt claimed by ... by (state nature of satisfaction).

A Or

2. That I have a counter-claim (or set-off or cross demand) for $ ... being a sum equal to (or exceeding) the claim of the said ... in respect of (here state grounds of counter-claim).

B 3. That I could not have set up the said counter-claim (or as the case may be) in the action in which the said judgment was obtained against me.

Affirmed at, etc ...

C **[19]** In a very real sense the affidavit filed under r. 95 BR is not one that satisfies the requirement of r. 94(2) BR. That being the case there is thus no affidavit at all for the purpose of setting aside the BN. That was the position also in the Supreme Court case of *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ D 324 at pp. 327 & 328; [1993] 2 MLJ 298 at pp. 302 & 303, where His Lordship Mohamed Dzaiddin SCJ (as he then was) had to consider whether an affidavit filed by the JD said to be under r. 95 BR satisfies the requirements of r. 94(2) BR. His Lordship analysed the matter as follows:

E In *re A Debtor, ex p Debtor* (No 523 of 1934) 1 Ch 347 Lord Hanworth MR, delivering the judgment of the court, dealt with r. 141 of the Bankruptcy Rules 1915 (which is in *para materia* with our r. 95) and stated at p. 349:

F The filing of an affidavit for the purpose of an application to set aside a bankruptcy notice, if the affidavit is one which complies with r. 140 of the Bankruptcy Rules 1915, is to be treated as notice of an application to set aside the notice, and then the procedure under r. 141 follows. That rule is mandatory and clear. It says this: 'The filing of such G affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for the hearing of the application, and not less than three days before the day so fixed shall give notice thereof, both to the debtor and the creditor, and their respective H solicitors, if known. If the application cannot be heard until after the expiration of the time specified in the notice as the day on which the act of bankruptcy will be complete, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

I

It is noted here that r. 140 dealt with the affidavit which must contain 'a counterclaim, set-off or cross demand' and one which the deponent could not have set up in the action in which the judgment or order was obtained. Slesser LJ, in his judgment (at p. 352) emphasized:

> It is, therefore, necessary that the affidavit in question should, on the face of it, show a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which the debtor could not have set up in the action in which the judgment or order was obtained.

We are concerned here with the content of the said affidavit. It merely denies and disputes that the appellant was indebted to the respondent in the sum of RM2,603,913.28, but fails to disclose that he has a counterclaim, set-off or cross demand, etc against the respondent, which he is required to depose under s. 3(1)(i) of the Bankruptcy Act ('the Act') and provided for in Form 7. Following the above decision and in the face of the above affidavit, we are of the opinion that the said affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) of the Act, and the case should have been treated as if no affidavit under r. 95 had in fact been filed. Similarly, as para 3 of the enclosure merely disputes his indebtedness in the said sum to the respondent 'based on an erroneous calculation and grossly exaggerated' without condescending to particulars of the amount actually due, we say that the said affidavit does not attract proviso 2(ii) of s. 3 which states that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the actual amount due.

[20] It would also be apposite to apply the approach taken by His Lordship Lee Hun Hoe CJ (Borneo) in *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 at pp. 280-281; [1988] 1 MLJ 304 at pp. 277, 305-306 as follows:

> It is not clear whether the respondent was also making a cross demand or challenging the amount actually owing as counsel for the respondent contended that all orders made previously were null and void. **If the respondent was making a cross-demand, he must quantify it. He just could not come to court and said his shares were worth considerably more**. The burden of proof is on the respondent to show by the affidavit or affidavits three

things which were stated clearly by Warner J. in *Re a debtor (No 75N of 1982, Warrington), ex parte The Debtor v. National Westminster Bank* [1983] 3 All ER 545 553 as follows:

> ... First, the affidavit or affidavits must show that he has a cross-demand against the creditor which is genuine. To satisfy that requirement, **the cross-demand must be put forward in good faith** and must have **a reasonable probability of success**, or, as it has also been expressed, **must give rise to a triable issue**. In the latter respect, there is no hard and fast rule as to the degree of proof required. It depends in each case on the particular facts and circumstances of that case. *Second, the affidavit or affidavits must show that the cross-demand could not have been set up in the action in which the judgment relied on by the creditor was obtained. Third, the affidavit or affidavits must show that the cross-demand need not be for a liquidated sum or even for a sum of money at all. But it must be capable of being quantified in terms of money and the affidavit or affidavits must quantify it.*

Proviso (ii) to subsection (2) of s. 3 reads:

> 3(2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:
>
> Provided that a bankruptcy notice:
>
> (i) ...
>
> (ii) *shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake*; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

Under proviso (ii), **a notice demanding a greater amount would not be liable to be held bad and incapable of amendment**.

Williams and Muir Hunter on *The Law and Practice of Bankruptcy,* 19th Ed. at p. 492 under the heading "Formal Defect Not To Invalidate Proceedings", refers to s. 147(i) of the English Bankruptcy Act 1914 which is word for word the same as our s. 131.

> 147(i) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court.
>
> Where a bankruptcy notice has been served, and not complied with, in respect of a judgment debt which has subsequently been reduced on appeal, that reduction does not retrospectively *per se* cause the notice to become defective or irregular, so as to require the protection of this section.
>
> The respondent gave notice of intention to oppose the petition but made no mention of any irregularity. It is fair to say that if one wants to challenge the validity of a bankruptcy notice, one must give proper notice. We are unable, as the respondent urged us, to say that the bankruptcy notice is irregular and invalid and that the respondent has not committed an act of bankruptcy within the meaning of s. 3(1)(c) of the Bankruptcy Act 1967 entitling the petitioning creditors to petition herein. (emphasis added)

[21] I agree with Miss P M Lee, learned counsel for the JC, that the case of *In Re A Debtor* is clearly distinguishable because:

> 1. The JD therein had specifically stated in his Affidavit that his cross-demand could not have been set up in the action in which judgment had been obtained against him (JD in our case did NOT state this at all in his Affidavit encl. 58); and
>
> 2. The *ratio decidendi* of that case was that the JD ought not to have been denied the opportunity of arguing/substantiating his cross-demand, whereas in our case, the JD was given the opportunity by the SAR to submit on his alleged cross-demand and adduce evidence in the form of Valuation Report exhibited in his Affidavit. Indeed this appeal is further opportunity for the JD to submit on his alleged cross-demand! *In re a Debtor* is not an authority on the merits of the cross-demand - it merely held that the SAR ought not have dismissed the allegation without hearing it.
>
> Unfortunately the JD's alleged cross-demand in our case herein is devoid of merits, and was thus dismissed by the SAR on that score. This is NOT a case where the SAR refused to hear the JD on his alleged cross-demand.

[22] I could not agree more with Miss P M Lee's above analysis. On this ground alone the appeal ought to be dismissed as being totally devoid of merits.

Whether The BN Issued Is Based On The Judgment Entered By The JC Against The JD

[23] The JD has raised in the affidavit filed under r. 95 BR that the BN issued is not based on the judgment entered as there is the claim for "exorbitant interest which the JD has not agreed". However the JD has not descended to any definitiveness or details on what is said to be defective or deficient of the BN. At any rate the Bankruptcy Court cannot go behind the final judgment against which there has not been any appeal. The guidance provided in the Supreme Court case of *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 at p. 279; [1988] 1 MLJ 304 at p. 305 through His Lordship Lee Hun Hoe CJ (Borneo) is worthy of repetition as set out below:

> **In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment**. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *In re Easton* (1893) 10 Mor 111; 9 TLR 409. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings. Under s. 3(1)(i) of the Bankruptcy Act 1967, a debtor commits **an act of bankruptcy** if a **creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt** or **sum ordered to be paid in accordance with the terms of the judgment**. He has **seven days after service of the notice** to **comply with the requirements of the notice** or *satisfy the court that he has a counter claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained*. Having regard to these provisions, it was wrong for the learned judge to strike out the creditors' petition. (emphasis added)

[24] Mr Justine for the JD contended that as the JC had filed its bankruptcy notice against the JD for a sum of RM249,345.85 after deducting the paid sum of RM20,019 and as the JC had received the payments of installments from the JD, the JC cannot claim for the balance of the judgment sum by issuing the

bankruptcy notice. He cited as authority for that proposition the case of *Datuk Mohd Sari bin Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 4 BLJ 265; [1992] 2 MLJ 344, where it was held that the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment as required by s. 3(1)(i) of the Bankruptcy Act 1967 but was in accordance with the terms of an agreement subsequently entered into by the parties, and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967.

[25] I must be forgiven for not been able to appreciate the argument of the JD's counsel. It defies logic and discourages JC from receiving whatever that the JD could pay towards reduction of his judgment debt. Miss PM Lee for the JC has distinguished *Datuk Mohd Sari*'s case (*supra*) as follows:

> (a) there was an agreement in that case entered into between the JC and the JD subsequent to the Judgment - accordingly the Court found that the demand for payment by the JC in that case was pursuant to the said agreement and not pursuant to the consent judgment as required by s. 3(1)(i) of the Bankruptcy Act 1967;
>
> (b) in our case herein, there was NO agreement between the JC and the JD (indeed, the JD also did not allege there was any agreement), hence the Bankruptcy Notice issued herein was pursuant to the Judgment dated 24 August 1987 and NOT pursuant to any "agreement".

[26] I have no good reason to disagree with a distinction made with such discernment. Indeed Mr Justine's proposition becomes more preposterous when he sought to persuade the court that even if there has been payment towards reduction of the judgment debt, the BN must still make a demand for the full judgment debt on pain of bankruptcy for non-compliance! Nothing could be further from the truth.

[27] Again it must not be forgotten that an affidavit under r. 95 BR is very focused in that the JD has to say that he has satisfied the judgment debt in full or that he has a counterclaim, set-off or cross demand that equals to or exceeds the JC's claim and if it be that then to aver that such a counterclaim, set-off or cross demand could not have been raised in the action in which the

judgment was obtained against the JD. Anything that transgresses that would be outside the trajectory of a r. 95 affidavit and ought to be traversed.

[28] If there is merit in the argument of non-compliance with the terms of the final judgment entered then it has to be raised in an application under r. 18(1) BR which reads as follows:

> **18. Applications to be made by summons in chambers**
>
> (1) Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.

Whether The BN Should State Or Take Into Account A Third Party Charge Over A Property In Favour Of The JC As Security For The Loan Taken By The JD For Which A Judgment Had Been Entered Against The JD

[29] If the JD wants to allege the above, he would have to file a separate application and not rely on a r. 95 affidavit which challenge is restricted in scope as set out above.

[30] In the case of *Lim Koon Chow v. AmBank (M) Bhd* [2012] 4 CLJ 624 at pp. 668 & 669; [2012] 8 MLJ 285 at pp. 322 & 323 it was held as follows:

> [138] At any rate the security referred to in para 3 of the CP refers to security taken from the JD and not from some third parties. The definition of 'secured creditor' in s. 2 of the BA means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment. This definition would exclude chargees holding a third party charge (see *Re Kho Kak Siew, ex p MUI Bank Bhd* [1993] 1 MLJ 208). Here the shares that is said to have been taken as security are not that of the JD but of a third party, Compusoft. To qualify as a 'secured creditor', the creditor must show that it was holding a mortgage, charge or *lien* on the JD's property as security for the debt due from the JD (*Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan* [1993] 2 MLJ 423; [1993] 2 AMR 1889; *Re Rabindera Singh Arjan Singh, ex p Malaysian International Merchant Bankers Bhd* [1989] 2 CLJ 858; *Re Ti Hock Soon, ex p Perwira Habib Bank Malaysia Bhd* [1993] 1 CLJ 477; *Re Yap Kin, ex p United Malayan Banking Corp* [1996] 5 MLJ 355).

> [139] I was referred by learned counsel for the JD to the case of *Hongkong & Shanghai Banking Corp v. Yip Kim Khoon* [1991] 3 MLJ 172; [1991] 2 CLJ 1631 where the court gave a wider meaning to the words 'secured creditor'. As pointed out by the learned editors of *Bankruptcy Handbook, MLJ Handbook Series*, Malayan Law Journal Sdn Bhd, Kuala Lumpur (1998) at p. II 36, this decision appears to be inconsistent with the other cases on this point.

[31] Nowhere is it required to be stated in the BN the security furnished by a third party. As pointed out above, even in the CP such a requirement is not necessary unless the security is that furnished by the JD himself. This argument that the BN is bad in law because of the non-statement on the security of the loan in the BN is without merits and so was dismissed.

Whether The JC Is Deemed To Have Admitted The Averments Raised By The JD In His Affidavit Filed Under r. 95 BR When The JC Has Not Filed Any Affidavit To Oppose

[32] The JC has not filed any affidavit in reply to the r. 95 affidavit filed by the JD. The JD was quick to argue that based on the authority of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281, all averments of the JD are deemed to be correct. To recollect what Ng Hee Thoong said is set out below at p. 286:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332.

[33] In *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 at p. 86 it was held that:

> Where there is a case to be decided on a contest of affidavits, material allegations which are not contradicted are deemed to be admitted.

[34] The JC has no issue with the principle enunciated in *Ng Hee Thoong v. Public Bank* (*supra*) and *Overseas Investment Pte Ltd* (*supra*). Miss P M Lee asked, looking askance: what is the "material allegation of fact" which the JD claims the JC is deemed to have admitted to?

[35] What was raised by the JC were issues of law which need not be raised in an affidavit in reply. The JC is not disputing the three payments made and as to the conclusion of the law, that is for counsel to argue in submissions which they did before the SAR and now before this court on appeal. As was stated in *Harcharan Singh Sohan Singh v. Ranjit Kaur S Gean Singh* [2010] 3 CLJ 29 at p. 31 that "A point of law may be raised at any stage with or without notice."

[36] In short there was no dispute of facts that the JC was deemed to have admitted other than the allegations of a set-off which is a point of law for submission and which had been submitted on. In other words taking the facts as the JD had set out, is there a set-off within the meaning of r. 94(2) and r. 95 BR?

[37] To rely on *Ng Hee Thoong*'s case to say that the BN ought to have been set aside because there was no affidavit in reply by the JC is to miss the point altogether.

Pronouncement

[38] In the circumstance, having given the submissions of the parties its fullest consideration, I am more than convinced that the appeal by the JD is wholly without merits and so I had dismissed it with costs of RM1,500.